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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING CENTER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the order of the Court of Appeals of Maryland, which dismissed Petitioner's appeal, entered in the above-entitled case on May 27, 1968.

Citations to Orders Below

The Court of Appeals of Maryland has not rendered any opinions in the above-entitled case. Its order granting Respondent's motion to dismiss Petitioner's appeal is printed in Appendix B hereto, *infra*, p. 5a. Its order denying Petitioners motion to reconsider order of dismissal, or in the alternative, to rescind order of dismissal, is printed in Appendix B, p. 5a.

Jurisdiction

The order of the Court of Appeals of Maryland was entered on May 27, 1968, Appendix B, p. 5a. Rehearing was denied on June 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

Questions Presented

(1) Where an appellant under Maryland law *must* file the record with the *clerk* of the *lower court* to initiate an appeal, can the State of Maryland, having afforded litigants the right to appeal to a higher court, constitutionally under the 14th Amendment deny a litigant that right because of alleged failure timely to transmit the record, when that failure is due to the neglect and omission of the State's own lower court clerk?

(2) Can the Court of Appeals of Maryland constitutionally under the 14th Amendment deny Petitioner its right to appeal when there is no evidence whatever supporting its holding that the one-day delay in transmitting the record was not due to the "neglect, omission or inability of the clerk of the lower court", (a circumstance that requires the Court under the Maryland Rules of Procedure to reinstate the appeal)?

(3) Under the foregoing circumstances, is the refusal of the Maryland Court of Appeals to extend to Petitioner the remedy of reinstating its appeal (as it has done in the past for all other appellants in reported cases similarly aggrieved by error or omission of the lower court clerk), a denial of due process and equal protection of the laws under the 14th Amendment?

Constitutional Provisions and Statutes Involved

The constitutional provision involved is the United States Constitution, 14th Amendment, printed in Appendix A,

infra, p. 1a. The statutory provisions involved are Article 5, Section 1, Annotated Code of Maryland (1957 ed. 1968 Replacement Vol.) and Maryland Rules of Procedure, Rules 825 and 835, printed in Appendix A, pp. 1a-4a.

Statement of Case

This proceeding involves a suit by Respondent for substantial money damages arising out of the alleged breach by Petitioner as tenant of a long-term shopping center lease, which shopping center was owned and operated by Respondent. On January 24, 1968, judgment was entered, after trial, in the Superior Court of Baltimore City in favor of Respondent and against Petitioner for $327,831.97 with interest from January 15, 1968 and costs of suit.

Thereafter, on February 7, 1968, Petitioner caused an appeal to be taken from said judgment to the Court of Appeals of Maryland and filed a supersedeas bond for $350,000 with the Superior Court of Baltimore City.

This appeal was dismissed by order of the Court of Appeals on May 27, 1968 (Appendix B, p. 5a) because of an asserted failure by Petitioner to make a timely filing of the record with the Court of Appeals. Rule 825 of the Maryland Rules of Procedure provides that the record must be filed with the Court of Appeals within thirty days after an appeal is taken. The rules require that the record be filed by the clerk of the *trial* court who is to be furnished with the record by the Appellant and his counsel, and that the *lower* court may extend the time for transmitting the record for a period not exceeding ninety days from the date the appeal was taken.

Orders extending Petitioner's time issued out of the lower court, with the 90th day expiring on May 7th.

Appellant filed the record with the lower court clerk on May 7, 1968 but that official for his own convenience, only lodged it with the Court of Appeals on May 8, 1968 — one day after the 90th day from the date the appeal was taken. The lower court clerk could have complied with the Rules by personal delivery of the record to the appellate tribunal on that day, or by mailing the record as permitted by Rule 825 (e). He did neither.

Petitioner then filed a motion to extend time with the Court of Appeals pursuant to Maryland Rule 825 (Appendix B, pp. 1a-3a). Attached to the motion were the affidavits of Frank L. Ensor, Assistant Chief Clerk of the Superior Court of Baltimore City, and Cleaveland D. Miller, one of the Petitioner's attorneys. The affidavits are printed in Appendix C, pp. 6a-9a, and clearly showed, in the language of Rule 825, that the critical one-day delay was solely due to the "neglect, omission or inability of the Clerk of the lower court". This motion was denied by the Court of Appeals, and Respondent's simultaneous motion to dismiss was granted, on May 27, 1968 (Appendix B, p. 5a).

Thereafter, Petitioner filed a motion with the Court of Appeals to rescind that Court's order of dismissal, or in the alternative, for rehearing. In paragraph 6 of that motion Petitioner stated:

> "With all deference to this Court, it is respectfully submitted that a rejection of appellant's [Petitioner's] application to reinstate its appeal herein would, under the circumstances here presented, quite possibly constitute a denial of due process of law within the meaning of the 14th Amendment of the Constitution of the United States. Unless the appeal herein is reinstated, appellant, a New York Corporation, licensed to do business in the State of Maryland, will have been deprived of its appellate remedy by miscarriage in the internal

> operations of the judicial machinery of the State of Maryland. Appellant itself has done nothing whatever to prejudice its standing before the Maryland courts; it has been cast out of court by the action (and inaction) of others." (R. 20-21).

This motion was denied by the Court of Appeals, without hearing or opinion, by order dated June 27, 1968.

Reasons for Granting the Writ

1. The action of the Court of Appeals of Maryland in dismissing Petitioner's appeal for failure to make a timely filing of the record, in the circumstances here involved, amounts to a taking of Petitioner's property without due process of law, in violation of the 14th Amendment of the United States Constitution.

Article 5, Section 1 of the Annotated Code of Maryland (1957 ed., 1968 Replacement Vol.) states that:

> "Any party may appeal to the Court of Appeals from any final judgment or determination of a court of law in any civil suit or action * * *."

Having granted a right of appeal, Maryland has incorporated the appellate procedure in its judicial process and the appellate procedure "cannot be conducted so as to deny that 'due process' which the Fourteenth Amendment requires." *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 45, 75 S. Ct. 92, 97 (1954) (Black, J., dissenting). And see, *Frank v. Magnum*, 237 U.S. 309, 327, 35 S. Ct. 582, 587 (1915):

> "And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases * * *, it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of

law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

The uncontroverted facts in this case, as outlined in the affidavits of lower court clerk Ensor and Miller, show that the fatal one-day delay was caused by the neglect, omission or error on the part of the clerk of the lower court and, therefore, by miscarriage in the internal operations of the judicial machinery of the State of Maryland, which Petitioner was required to employ under Maryland law. The affidavit of Clerk Ensor, which was never contradicted in any respect by Respondent, shows that Petitioner's counsel had done everything required to make the record ready for transmittal to the Court of Appeals by May 7, 1968 and that they had done everything required of them in time for the record to be transmitted in proper time, Appendix C, p. 7a. Nevertheless, the lower court clerk transmitted the record on May 8, 1968 — a day too late — only because he wanted to "kill two birds with one stone" by sending the record in this case from his Baltimore office to the Court of Appeals in Annapolis at the same time he sent a record to the Court of Appeals in another case. Actually, his mere mailing of the record on May 7th would have complied with the Rules.

The refusal of the Court of Appeals to hear this appeal on the merits, when the failure to file the record in time was due to the neglect, omission and error of the state court clerk is a denial of due process within the meaning of the 14th Amendment.

2. The only evidence before the Maryland Court of Appeals herein is that the one-day delay (beyond the 90-day limit) in filing the record with that court was entirely due

to the "neglect, omission or inability of the clerk of the lower court".

Rule 825 (d) of the Maryland Rules of Procedure states:

> "An appeal *shall not* be dismissed because the record has not been transmitted within the time prescribed, if it appears to this Court that such delay was occasioned by the *neglect, omission or inability* of the clerk of the lower court, the court stenographer or appellee; provided, however, that such neglect, omission or inability shall not be presumed but must be shown by the appellant." (Emphasis added.)

This provision appears to be mandatory and, indeed, has been so recognized by Respondent. See, Answer to Appellant's Motion to Reconsider Order of Dismissal, etc., R. 29. It has generated a long line of decisions of the Maryland Court of Appeals all holding that a delay in transmitting the record on appeal, occasioned by mistake or miscarriage of a clerk, will not deprive a litigant of his right to appeal—See, *e.g., Freeman v. Stanbern Construction Co.*, 205 Md. 71, 106 A. 2d 50 (1954) (delay due to clerk's good-faith but erroneous belief that record could not be transmitted before appeal bond filed); *Lewin v. Simpson*, 38 Md. 468 (1873) (delay due to clerk's having misplaced papers); *Oxenham v. Mitchell*, 160 Md. 269, 153 A. 71 (1931); *Ellinger v. Baltimore City*, 90 Md. 696, 45 A. 884 (1900) (affidavit of clerk exonerated appellants from default in delay in absence of other evidence).

However, in this case the Court of Appeals ignored these earlier cases and disregarded the uncontroverted evidence that the delay in filing the record was due to the error and omission of Clerk Ensor. The latter's affidavit was never controverted by Respondent and constitutes the entire record with the sole exception of the Miller affidavit. The Court of Appeals' disregard of the Ensor affidavit presents

this Court with a situation analogous to that found in *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960). There this Court reversed the conviction of petitioner on loitering and disorderly conduct charges on the ground that the conviction deprived him of liberty without due process in that there was no evidence to support a finding of guilt. Mr. Justice Black, speaking for the Court, reviewed the record, agreed it was devoid of evidence supporting the charges, and stated:

> "Just as 'Conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S. at 206, 80 S. Ct. at 629.

Accord, *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 86 S. Ct. 211 (1965). And see, *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297, 84 S. Ct. 1302, 1308 (1964), where the Court said:

> "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense."

So, too, the failure to recognize substantial and real compliance with procedural rules may result in a denial of due process.

Here, there is no evidence in the record to support the holding of the Court of Appeals, implicit in its dismissal of Petitioner's appeal, that the delay in transmitting the record was not due to the error and omission of the lower court clerk. This circumstance, therefore, amounts to a denial of due process.

3. Under the foregoing circumstances, the refusal of the Maryland Court of Appeals to entertain this appeal on the

merits is also a denial of equal protection of the laws under the 14th Amendment. By invoking a claimed denial of due process of law in its motion to rescind denial addressed to the Maryland Court of Appeals (see pp. 4-5, *supra*), Petitioner preserved for review in this Court the issue of equal protection, since due process of law has been described as including equal protection of the laws, operating on all alike without discrimination. See *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S. Ct. 570, 572 (1894). Even under the 5th Amendment, silent as it is as to equal protection of the laws, "arbitrary discrimination between persons in similar circumstances would violate the due process clause. . . ." *Wallace v. Currin*, 95 F. 2d 856, 867 (4th Cir. 1938), *aff'd*, 306 U.S. 1, 59 S. Ct. 379 (1939). "Indeed, it [equal protection] has frequently been said to be essential to due process of law * * *." *Pfeiffer Brewing Co. v. Bowles*, 146 F. 2d 1006 (Emer. Ct. App. 1945).

As has been demonstrated above, Maryland has provided an ameliorative rule in 825 (d) of the Maryland Rules of Procedure, which specifically mandates that neglect, omission or inability of the lower court clerk shall not result in dismissal of an appeal. Also as has been shown above, the Maryland Court of Appeals itself has exercised its powers under this rule to preserve the rights of appellants in the past. Yet in the instant case, the Maryland Court of Appeals has, without any evidentiary basis, and in a holding that can only be described as wholly arbitrary, dismissed Petitioner's appeal. Thus Petitioner, a corporation foreign to Maryland, has been denied equal protection of the laws. In *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239, 77 S. Ct. 752, 756 (1957), the Court reversed Bar Examination Board's refusal to admit plaintiff to practice of law, saying:

"Even in applying permissible standards officers of a State cannot exclude an applicant where there is *no basis for their finding* that he fails to meet these standards, *or when their action is invidiously discriminatory.*" (Emphasis supplied.)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NORMAN P. RAMSEY,

Counsel for Petitioner.

September 24, 1968.